Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-121

In The

# Supreme Court of the United States

October Term, 1985

RALPH KEMP, WARDEN,
*Petitioner,*

v.

CHARLIE YOUNG, JR.,
*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I.

Whether in light of Georgia case law interpreting Georgia's death penalty statute, the reasoning of this Court in *Bullington v. Missouri*, 451 U.S. 430 (1981), should not be extended so as to equate the factual findings made by a jury as to statutory aggravating circumstances with a jury's verdict as to guilt or innocence?

II.

Whether a federal court, acting in its capacity as a reviewing court in a federal habeas corpus action, may substitute its judgment for that of the highest state appellate court as to the construction to be given the statutory language contained in a state's death penalty statute?

III.

Whether, in light of Georgia law as to the imposition of the death penalty, double jeopardy principles do not prohibit the submission to the jury, on retrial as to sentence, of any statutory aggravating circumstances not originally submitted by the prosecution, nor found by the jury?

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## REASONS FOR GRANTING THE WRIT

### UNDER GEORGIA'S STATUTORY SCHEME FOR IMPOSING THE DEATH PENALTY, A JURY'S FINDINGS ON STATUTORY AGGRAVATING CIRCUMSTANCES CANNOT BE DEEMED TO BE THE EQUIVALENT OF A JURY'S VERDICT AS TO THE GUILT OR INNOCENCE OF A DEFENDANT.

Since the filing of this petition for a writ of certiorari, a decision by the Supreme Court of Georgia has been entered which bears significantly on the issue raised by means of this petition for a writ of certiorari. Specifically, the Supreme Court of Georgia in *Spraggins v. State*,

No. 42713 (Ga. decided Nov. 8, 1985), reviewed the decision of the Eleventh Circuit Court of Appeals in *Young v. Kemp*, 760 F.2d 1097 (11th Cir. 1985), the instant case, and concluded that the nature and function of statutory aggravating circumstances under Georgia's death penalty statute had been improperly construed by the Eleventh Circuit Court of Appeals. The Supreme Court of Georgia also found that the holding of *Young v. Kemp, supra* was inopposite to cases decided by it with reference to the nature and function of statutory aggravating circumstances under Georgia's death penalty statute. Therefore, the recent decision of the Supreme Court of Georgia in *Spraggins v. State, supra*, is directly in conflict with the decision of the Eleventh Circuit in *Young v. Kemp, supra*, which federal case Petitioner is seeking to have reviewed by this Court by means of granting this petition for a writ of certiorari.

Basically, the Supreme Court of Georgia in *Spraggins v. State, supra*, reaffirmed the position it had earlier taken in *Zant v. Redd*, 249 Ga. 211, 290 S.E.2d 36 (1982). The Supreme Court of Georgia noted that in *Zant v. Redd, supra*, in the state habeas corpus proceeding the habeas corpus court had agreed with Redd's argument that under *Bullington* it was a violation of the Double Jeopardy Clause for the State to have submitted to the jury at the resentencing hearing the two statutory aggravating circumstances not found by the jury at Redd's original trial. The Supreme Court of Georgia noted with respect to *Zant v. Redd, supra*, that:

> On appeal, we reversed, rejecting the argument that the failure of the jury to list certain aggravating circumstances in support of the death penalty amounts

> to an "acquittal" of those circumstances. The reason for our rejection of this argument is that, since the Georgia death-penalty (sic) statute only requires a finding of one aggravating circumstance in order to impose the death penalty, O.C.G.A. § 17-10-31, it cannot be said that the listing of only one of several aggravating circumstances in support of the death penalty is an "acquittal" of the others. *In addition, aggravating circumstances are not offenses*, but rather they are procedural standards designed to control a jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty. For these reasons, we found applicable the rule of *North Carolina v. Pearce, supra*, that "the slate is wiped clean" where the defendant overturns his death sentence on technical grounds. That is, the sentence is nullified, and the state and defense start anew; at the resentencing hearing, the state may offer proof of aggravating circumstances not offered at the first trial, as well as aggravating circumstances offered at the first trial but not listed by the jury in support of the death sentence.

*Spraggins v. State, slip op.* at 11-12.

Later in its decision in *Spraggins v. State, supra*, the Supreme Court of Georgia found the following:

> The rationale employed in *Zant v. Redd, supra*, was approved in *Green v. Zant, supra*, and *Young v. Kemp, supra*. As recognized by these decisions, where multiple circumstances are submitted to the jury, a finding by the jury of less than all of the aggravating circumstances does not constitute an acquittal of the aggravating circumstances not listed by the jury. This distinguishes *Bullington v. Missouri, supra*, from the present case, and it also distinguishes our decision in *Ward v. State, supra*, which antedated *Bullington*.

*Spraggins v. State of Georgia, slip op.* at 15-16.

Petitioner respectfully submits that the recent decision of the Supreme Court of Georgia in *Spraggins v. State* reaffirmed the decision of that Court with respect to this case on interlocutory appeal in *Young v. State*, 251 Ga. 153, 303 S.E.2d 431 (1983) [that retrial of Respondent not barred because state could seek death penalty based on two prior statutory aggravating circumstances and an additional statutory aggravating circumstance] and directly conflicts with the decision of the Eleventh Circuit in this case in *Young v. Kemp*, 760 F.2d 1097 (11th Cir. 1985). The decisions of the Supreme Court of Georgia in *Young v. State*, *supra*, and *Spraggins v. State*, *supra*, amount to a proper construction of Georgia's death penalty statute with respect to the nature and function of statutory aggravating circumstances.

As the Supreme Court of Georgia has on two occasions adopted a concise and clear construction of Georgia's death penalty statute with respect to the nature and function of statutory aggravating circumstances, Petitioner respectfully submits that the federal courts in this case should have followed the highest state court's construction of those statutes, rather than disregarding state law and improperly equating statutory aggravating circumstances under the Georgia death penalty statute with "offenses" under *Bullington v. Missouri*, 451 U.S. 430 (1981). *See O'Brien v. Skinner*, 414 U.S. 524 (1974).

## CONCLUSION

For all of the above stated additional reasons, Petitioner prays that this Court grant a writ of certiorari in order to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit, which are directly in conflict with the construction of Georgia's death penalty statute given by the Supreme Court of Georgia.

Respectfully submitted,

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